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Federal Jurisdiction – A Lamentable Situation

J. M. Evans

Osgoode Hall Law School of York University

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Comments on Legislation and Judicial Decisions

Chronique de législation et de jurisprudence

FEDERAL JURISDICTION—A LAMENTABLE SITUATION.—It was entirely predictable that the decisions of the Supreme Court of Canada in *Quebec North Shore Paper Co. v. Canadian Pacific Ltd*¹ and in *McNamara Construction (Western) Ltd v. The Queen*² would severely jeopardise the effective exercise of many aspects of the original jurisdiction of the Federal Court of Canada.³ Since those cases were decided, six other cases have been decided by the Supreme Court on the constitutional limits of the jurisdiction of the Federal Court, and in more than fifty judgments rendered by both divisions of the Federal Court, the effect of the two principal decisions of the Supreme Court has had to be considered. Both the proliferation of litigation over such preliminary matters of comparatively little intrinsic importance, and the serious injustices perpetrated by the results of many of these cases, require, as a matter of urgency, remedial legislative action. This comment attempts an analysis of the burgeoning case law on the constitutional reach permitted to federal jurisdiction, and considers some possible methods of defusing many of the constitutional land-mines which the Supreme Court's interpretation of the British North America Act⁴ has placed around much of the original jurisdiction of the Federal Court.

It will be recalled that in *Quebec North Shore* and *McNamara* the Supreme Court held that Parliament's constitutional authority to establish further courts "for the better administration of the laws of

¹ [1977] 2 S.C.R. 1054.

² [1977] 2 S.C.R. 654.

³ For a comment that was highly critical of these cases, see P.W. Hogg (1977), 55 Can. Bar Rev. 550. Nor have cries of lament been confined to contributors to the learned journals; see, for example, the comments by Collier J. in *Pacific Western Airlines Ltd v. The Queen*, [1979] 2 F.C. 476, at p. 490 (T.D.).

⁴ 1867, 30 & 31 Vict., c. 3, as am. (U.K.).

Canada''^{4a} only enables it to confer jurisdiction upon the Federal Court to entertain claims that are "founded on some existing federal law".⁵ A law that has not been enacted by Parliament is not "a law of Canada" merely because its repeal or amendment is within the exclusive legislative competence of Parliament. Nor is the constitutional requirement of "a law of Canada" necessarily satisfied by those provisions in the Federal Court Act⁶ which confer jurisdiction upon the Federal Court to decide cases involving designated subject-matter or specified parties. The Federal Court may only assume jurisdiction over a case if an affirmative answer is given to each of the following three questions. First, does the Federal Court Act, as a matter of statutory interpretation, confer jurisdiction over the dispute? Secondly, if it does, is the plaintiff's claim founded on existing federal law? Thirdly, does Parliament have the constitutional authority to enact the substantive law in question? In other words, both the conferral of jurisdiction, and the substantive law upon which the court's jurisdiction can operate must depend upon some valid federal law. The thrust of *Quebec North Shore* and *McNamara Construction* was to deny, in general terms, the existence of a body of federal common law that was co-extensive with the unexercised constitutional legislative competence of Parliament over matters assigned to it.^{6a} Thus a law will normally only be a law of Canada for the purpose of section 101 of the British North America Act if it is enacted by or under federal legislation. Nonetheless, at least one exception to this restrictive definition of a law of Canada has been recognised. This is that the legal liability of the Crown in right of Canada always depends upon a law of Canada, even when it is not clearly based upon some federal statute, such as the Crown Liability Act.⁷

^{4a} *Ibid.*, s. 101.

⁵ Per Laskin C.J.C. in *McNamara's case*, *supra*, footnote 2, at p. 659.

⁶ R.S.C., 1970 (2nd Supp.), c. 10.

^{6a} But it would now appear from the recent decisions of the Supreme Court in *Rhine* and *Prytula*, *infra*, footnotes 34a and 43, that despite the contractual nature of the relationship between the parties, a plaintiff's rights may be founded upon federal law provided that federal legislation has a sufficient "impact" upon them.

⁷ R.S.C., 1970, c. C-38. One other possible exception may also be noted. Somewhat surprisingly there is authority for the proposition that the British North America Act, 1867 may itself be a law of Canada which the Federal Court has jurisdiction to administer. The question was most explicitly considered in *The Queen in the right of Canada v. The Queen in the right of the Province of Prince Edward Island*, [1978] 1 F.C. 533 (C.A.) in which P.E.I. claimed damages from the federal Crown for failing to perform its duties to provide a ferry service between the island and the mainland. The duty was contained in the terms under which P.E.I. was admitted to Confederation, an order in council made pursuant to s. 146 of the British North America Act, 1867. The case came before the Federal Court by virtue of its jurisdiction over intergovernmental disputes (s. 19).

The judgments in these cases left considerable room for argument about their precise scope. What was to be included in the term "federal law" was not totally clear, nor was the requirement that claims be "founded" on such a law. One context in which it was apparent that very serious difficulties might be encountered was in connection with suits involving multiple parties, only some of whose rights or liabilities fell within the constitutional limits of federal jurisdiction. This question has been the subject of a recent decision by the Supreme Court of Canada. The court's answer poses serious practical problems for litigants, proceeds upon some highly questionable constitutional reasoning and may so undermine the efficacy of much of the admittedly valid original jurisdiction of the Federal Court that there is little alternative left to Parliament except to return jurisdiction to the courts in the provinces.

This comment begins by considering the particular problems inherent in litigation involving multiple parties, some of whom may be sued only in the Federal Court, and then examines some of the wider implications of recent decisions for the future of federal jurisdiction.

Federal jurisdiction and multiple parties

One question which has already arisen in a number of cases is whether the Federal Court can be empowered to determine the rights and duties of a party, which would otherwise fall outside federal

The parties appeared content to accept that the Federal Court had jurisdiction, and Jackett C.J. concluded that it was not apparent on the face of the proceedings that the Federal Court lacked jurisdiction. He thought (at pp. 561-562) that the fact that the duty in question was not imposed by provincial law distinguished the case from *McNamara*. Moreover, he also thought it possible that s. 19 of the Federal Court Act both conferred jurisdiction and authorized the court to apply substantive federal law. Perhaps the easiest answer, though, was that the liability of the federal Crown is always a question of federal law. See *infra*, footnote 26.

The constitution is a law of Canada in the sense that it is the ultimate criterion of the rule of recognition by which the validity of both federal and provincial laws is determined. But it is clearly of a superior order to the federal laws which it authorizes Parliament to enact. It would, however, be odd to say that the Federal Court's jurisdiction to determine the constitutionality of a federal statute was contingent upon its holding it to be valid. See *Denison Mines Ltd v. Att.-Gen. of Canada*, [1973] 1 O.R. 797 (H.C.), where Donnelly J. held that the Federal Court Act removed the jurisdiction of provincial superior courts to determine the validity of a federal statute in a proceeding which otherwise fell within one of the heads of the exclusive jurisdiction of the Federal Court. It would also be inconvenient to require a party who wished to challenge a federal board's decision on the ground that it had acted *ultra vires* the statute or, alternatively, that the enabling legislation was invalid, to pursue these grounds in different courts. Contrast *Law Society of B.C. v. Att.-Gen. of Canada* (1980), 108 D.L.R. (3d) 753 (B.C.C.A.).

jurisdiction, by virtue of the fact that the right or liability in question arises out of an incident from which proceedings have properly been instituted in the Federal Court. For instance, in *Pacific Western Airlines Ltd v. The Queen*,⁸ the owners and operators of an aircraft that had crashed at an airport in Cranbrook, British Columbia, sought to join as defendants to the action, the federal Crown, certain named Crown servants, the City of Cranbrook as the owner of the airport and the employer of other defendants whose negligence the plaintiffs alleged had contributed to the accident, the manufacturers of the aircraft and the suppliers of allegedly defective aircraft equipment. It was held that the Federal Court's jurisdiction was confined to claims founded on existing federal law and that only the claim against the Crown satisfied this test.⁹ The court's jurisdiction was no greater in a case in which there were multiple defendants than it would have been had separate proceedings been instituted against each defendant. By virtue of the exclusive jurisdiction conferred upon the Federal Court over suits brought against the federal Crown,¹⁰ legal proceedings would have to be instituted in more than one court. Some of the alarming implications of this result did not go unnoticed in the Trial Division by Collier J.:¹¹

Multiplication of proceedings raises the spectre of different results in different courts. The plaintiffs then face the question, in respect of the defendants, other than the Crown: the court of which province, or perhaps more than one province? . . . There may well be other jurisdictional questions. I do not know the solution to any of them.

The situation is lamentable. There are probably many other persons who have claims arising out of this air disaster. The jurisdictional perils must be, to all those potential litigants, mystifying and frightening.

Despite the obvious potential hardships involved in this strict approach to the interpretation of British North America Act, 1867,

⁸ *Supra*, footnote 3; aff'd, [1980] 1 F.C. 86 (C.A.).

⁹ The plaintiffs' contention that a cause of action in their favour arose out of breaches of certain provisions of the federal Aeronautics Act and the regulations made thereunder was rejected. Their argument, based on an analogy with maritime law, that there was a body of federal law called "aviation law" was also dismissed.

¹⁰ Federal Court Act, *supra*, footnote 6, s. 17(1).

¹¹ *Supra*, footnote 3, at p. 490. Considerations of this kind prompted the Supreme Court of Canada in *'The Sparrows Point' v. Greater Vancouver Water District*, [1951] S.C.R. 396, to interpret the statutory jurisdiction of the Exchequer Court over claims for "damage done by any ship" in a generous manner by allowing the plaintiff to join the National Harbours Board as a joint tortfeasor with the ship. Contrast, though, *Bow, MacLachlan & Co. Ltd v. 'The Camosun'*, [1909] A.C. 597 (admiralty jurisdiction of the Exchequer Court did not extend to a claim made by the defendant against a third party over which the court would have had no jurisdiction if it had been asserted by an independent claim).

section 101,¹² there can now be no doubt that it is the law.¹³ This has been made abundantly clear by the recent decision of the Supreme Court of Canada in *The Queen v. Thomas Fuller Construction Co. (1958) Ltd.*¹⁴ The plaintiff, Foundation, had brought an action in the Federal Court against the Crown in which it alleged that the Crown was in breach of a building contract and that it was liable in negligence for damage sustained by the plaintiff as a result of blasting operations carried out by another contractor, Fuller. The Crown then served a third party notice upon Fuller, in which the Crown claimed a contractual indemnity from Fuller for any damages for which it might be held liable to the plaintiff, or, in the alternative, for contribution or indemnity under the terms of the Negligence Act¹⁵ of Ontario. The plaintiff had not joined Fuller as a co-defendant. The Crown's third party notice was struck out on the ground that it was not founded on federal law and was therefore outside the jurisdiction that could constitutionally be exercised by the Federal Court.

It will be recalled that the Supreme Court had held in *McNamara*¹⁶ that in the absence of existing, substantive federal law, Parliament could not confer jurisdiction upon the Federal Court to entertain actions brought by the Crown. The federal Crown's right to sue in tort or upon a contract is founded on the applicable provincial law, albeit that Parliament may have unexercised legislative authority to amend the law applicable to the rights of the Crown. Since the adjudication of the rights asserted by the Crown in the main action in *McNamara* did not fall within federal jurisdiction, it followed *a fortiori* that any claim over for indemnity in respect of the

¹² For a poignant example of the problems, see *Attorney-General of Canada v. DeLaurier* (1978), 93 D.L.R. (3d) 434 (Man. Q.B.), where the Crown's action was held out of time by the Manitoba court in which it was ultimately brought, after the decision in *McNamara* had made it clear that the proceedings already pending before the Federal Court had been instituted in the wrong forum.

¹³ Earlier authorities supporting this position include *Anglophoto Ltd v. "The Ikaros"*, [1973] F.C. 483 (T.D.); *Desbiens v. The Queen*, [1974] 2 F.C. 20 (T.D.); *McGregor v. The Queen*, [1977] 2 F.C. 520 (T.D.); *Alda Enterprises Ltd v. The Queen*, [1978] 2 F.C. 106 (T.D.); *Attridge v. The Queen* (1978), 86 D.L.R. (3d) 543 (Fed. Ct T.D.); *Tomossy v. Hammond*, [1979] 2 F.C. 232; *Nichols v. The Queen* (an unreported judgment of the Trial Division rendered on Sept. 28th, 1979; No. T-3094-79); *Dolan v. The Queen* (an unreported judgment of the Trial Division rendered on April 29th, 1979; No. T-1180-79).

¹⁴ (1979), 106 D.L.R. (3d) 193: the decision affirmed the judgment of the Federal Court of Appeal, [1979] 1 F.C. 877. See John B. Laskin and Robert J. Sharpe, *Constricting Federal Court Jurisdiction: A Comment on Fuller Construction* (1980), 30 U.T.L.J. 283, for an able discussion of many of the issues raised in this article.

¹⁵ R.S.O., 1970, c. 296, s. 2(1).

¹⁶ *Supra*, footnote 2.

loss, in the absence of any relevant federal law, must also fail. However, in *obiter dicta*, couched somewhat obliquely in tentative and narrow terms, Laskin C.J.C. stated:¹⁷

I would, however, observe, that if there had been jurisdiction in the Federal Court there could be some likelihood of proceedings for the contribution or indemnity being similarly competent, at least between the parties, in so far as the supporting federal law embraced the issues arising therein.

Quite apart from the fact the Chief Justice evidently did not intend these words to embody his final opinion on the matter, they could not reasonably be interpreted to mean that Parliament could constitutionally confer upon the Federal Court a pendent or ancillary jurisdiction to dispose of claims against other parties, simply because they arose out of the incident which gave rise to the main action which was founded on a law of Canada. For one thing, he appeared to envisage that the parties to the claim over should also have been parties to the principal action, and for another, that the claim over itself should be "embraced" by existing federal law. On the other hand, it might be said that if this were all that the Chief Justice meant, then it is difficult to understand why it needed to be mentioned at all as a separate problem to which so tentative a solution seemed appropriate. A claim that satisfied this latter test would surely generally be constitutionally sustainable as a cause of action founded on a law of Canada. What the Chief Justice may have had in mind is that if a federal statute can be interpreted as referentially incorporating into federal law some body of provincial law, then that will suffice to found federal jurisdiction.¹⁸

This dictum might have been used to prise open a fissure in the monolithic face of *McNamara*. It was, nonetheless, hardly surprising that the Federal Court subsequently disallowed third party claims for contribution and indemnity that arose out of a main action which was within the Federal Court's jurisdiction.¹⁹ The judicial sense of

¹⁷ *Ibid.*, at p. 664.

¹⁸ Cf. *Schwella v. The Queen*, [1957] Ex. C.R. 226, at p. 230, where, in deciding that the Exchequer Court had jurisdiction over a third party notice served by the Crown, Thurlow J. said: "Under [section 3 of the *Crown Liability Act*, S.C., 1952-53, c. 30], the law applicable for determining when the Crown is liable in the case of tort committed in the Province of Ontario is the law of that province and includes the provisions of the *Negligence Act*, which was in force when the *Crown Liability Act* came into effect." However, the authority of this case has now been undermined because the court identified the term "laws of Canada" with the scope of the legislative competence of Parliament. But see now the reasoning in *Rhine and Prytula*, footnotes 6a, *supra* and 34a and 43, *infra*.

¹⁹ See, for example, *McGregor v. The Queen*, [1977] 2 F.C. 520 (T.D.); *Western Caissons (Quebec) Ltd v. McNamara Corporation of Newfoundland Co., Ltd*, [1979] 1 F.C. 509 (C.A.); see also *Lewis Insulations Ltd v. Goodram Bros. Ltd* (1978), 90 D.L.R. (3d) 311 (Ont. H.C.). Contrast, however, *Davie Shipbuilding Ltd v. The Queen*, [1979] 2 F.C. 235, at pp. 240-244 (T.D.).

fidelity to the pronouncements of the highest court in the land prevailed over a recognition that to require such claims to be pursued elsewhere was calculated to increase parties' costs, and to delay the final settlement of all the issues arising from the facts upon which the main action rested. By the time that the question reached the Supreme Court in the *Fuller* case, it would be difficult to deny that the decisions in *Quebec North Shore* and *McNamara* had already cast their shadow over it. However, the reasoning by which the Supreme Court concluded that the theory upon which those cases rested inexorably drove it to the unsatisfactory result reached in *Fuller*, deserves closer examination.

Apart from the two principal decisions in which the Supreme Court formulated the constitutional limitations of federal jurisdiction, the only authority upon which the court relied in *Fuller's* case was *The Bank of Montreal v. The Royal Bank of Canada*.²⁰ The issue in that case was whether the grant of jurisdiction to the Exchequer Court to determine "actions . . . of a civil nature . . . in which the Crown is plaintiff",²¹ extended as a matter of statutory interpretation to a claim for indemnity by a party against whom the Crown was proceeding in the principal action. The Supreme Court held that since "the proceeding against the third party is a substantive proceeding and not a mere incident of the principal action",²² the claim for indemnity was not encompassed by the suit brought by the Crown out of which the claim arose. The question in *Fuller*, however, did not depend upon the scope of the statutory jurisdiction of the Federal Court. Quite clearly, the claim made by the Crown fell within it.²³ The contested issue was whether the Crown's claim was founded upon federal law for the purpose of determining the constitutional scope of the court's jurisdiction. Precisely what the logical connection is between this, and the question decided in *The Bank of Montreal* is not easy to see. It can be conceded that if the claim for contribution in that case had been pursued in separate

The question had already arisen in *Consolidated Distilleries Ltd v. Consolidated Exporters Corporation Ltd*, [1930] S.C.R. 531. In that case the Crown had sued the defendants in the Exchequer Court on certain bonds. The defendants' third party notice claiming contractual indemnity was struck out on the ground that their rights under the contract were not governed by a law of Canada. But see the judgment in *Schwella v. The Queen*, [1957] Ex. C.R. 226.

²⁰ [1933] S.C.R. 311.

²¹ Exchequer Court Act, R.S.C., 1927, c. 34, s. 30(d).

²² *Ibid.*, at p. 316. See also the cases on the admiralty jurisdiction of the Exchequer Court cited in footnote 11, *supra*.

²³ Federal Court Act, *supra*, footnote 6, s. 17(4)(a), provides that the Trial Division of the Federal Court has concurrent original jurisdiction "in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief".

proceedings, it could hardly have been said to be a civil action to which the Crown was plaintiff. It makes sense, therefore, to say that the Crown is still not "the plaintiff" when the claim is asserted by a third party notice to the principal action. However, even if the Crown had instituted separate proceedings for contribution in *Fuller*,²⁴ the argument that its claim was founded upon federal law would still be plausible. For a condition precedent to the Crown's right to contribution was its liability to the plaintiff in the main action,²⁵ a question that is indisputably one of federal law.²⁶ Whether the ability of a party to divide the grounds of his claim into separate proceedings founded respectively upon federal and provincial law should or should not be used as the test of the federal law basis of a cause of action, the issue is hardly resolved by *The Bank of Montreal* case. In any event, in *Fuller* federal and provincial law provided an inextricably mixed basis of the right asserted by the Crown against the third party.

A further point of difference between the *The Bank of Montreal* and *Fuller* is that the former was decided solely on a question of statutory interpretation. *Fuller*, of course, depended upon the constitutionality of a legislative provision, the interpretation of which, if valid, indisputably conferred the requisite jurisdiction upon the Federal Court to decide the Crown's claim. It would surely not have been unreasonable for the Supreme Court to have started its analysis with the familiar presumption in favour of the validity of Acts of Parliament, and to have concluded by finding that section 101 of the British North America Act should be interpreted to include a power to confer jurisdiction upon the Federal Court to decide those matters that could be fairly said to be necessarily incidental to the effective exercise of the jurisdiction that Parliament

²⁴ A course which the Ontario courts, by a remarkable interpretation of the Negligence Act, have consistently denied to claimants for contribution who have been sued to judgment by the injured party. See *Cohen v. S. McCord & Co.*, [1944] O.R. 568; *Rickwood v. Town of Aylmer* (1957), 8 D.L.R. (2d) 702; *Paul Papp Ltd v. Fitzpatrick*, [1967] 1 O.R. 565. In *Fuller*, *supra*, footnote 14, however, Pigeon J. (at p. 205) said of these decisions: "I am not at all sure that the construction of the statute which gave this unsatisfactory result was correct." For a less radical view, see *Bates v. Illerburn* (1976), 70 D.L.R. (3d) 154, at p. 158, where it was suggested that *Cohen v. McCord* might not apply when a claimant for contribution against the federal Crown had been sued by the injured party in an Ontario court. Any other result would destroy the right to contribution because the federal Crown can only be sued in the Federal Court.

²⁵ This point was made clearly by Martland J. in dissent (*ibid.*, at p. 198) where he stated: "In order to succeed in its third party claim, the Crown must first establish its liability to Foundation. That liability involves 'federal law' as is pointed out . . . in *McNamara* . . .".

²⁶ See *McNamara Construction (Western) Ltd v. The Queen*, *supra*, footnote 2, at p. 662.

had quite validly conferred upon it.²⁷ However, the refusal of the court to consider the injustice to the litigants of its interpretation of section 101 could not be made clearer that it was by Pigeon J. when he stated that even if the Negligence Act precluded the Crown from instituting separate proceedings for contribution in the Ontario courts after being held liable in the Federal Court, the remedy was legislative reform, not constitutional manipulation.²⁸

The Supreme Court's constitutional analysis in *Fuller* started from a quite different point. Pigeon J. reasoned that one of the fundamentals of the allocation of judicial power inherent in the British North America Act was that the superior courts in the provinces were to exercise general jurisdiction over both federal and provincial law. The disadvantages of a dual court system were avoided by a system of federal and provincial co-operation through the federal appointing power and provincial control over the administration of justice. Our constitution did not require the establishment of separate courts to administer provincial and federal law, although the creation of federal courts was expressly authorised. But since the establishment of such courts was not *necessary* (that is constitutionally mandated), how could it be argued that the inclusion of an ancillary power, of the kind described above, could be *necessary* for the exercise of Parliament's legislative authority?

What this amounts to, in effect, is a decision to give a very narrow interpretation to Parliament's constitutional power to create a federal court. Section 101 is seen as an exception to the dominant scheme of a unitary court system. Now it may be that Parliament was unwise to give the jurisdiction that it did to the Federal Court, and that American experience confirmed the undesirability of creating a separate federal court with wide original jurisdiction—some of it exclusive—over large areas of federal law. But it may well be thought that this is essentially a matter for Parliament to decide, and that once Parliament has spoken clearly it is appropriate for the Supreme Court to defer to its decision. To limit the jurisdiction that

²⁷ Cf. P.W. Hogg, *Constitutional Law of Canada* (1977), pp. 81-82, 91-94, 209-211. See, however, *Consolidated Distilleries Ltd v. Consolidated Exporters Corporation Ltd*, *supra*, footnote 19, at p. 536, where Anglin C.J.C., writing for the majority of the court, squarely rejected the contention advanced in the text that jurisdiction over third party claims was "necessarily incidental" to the court's exercise of the jurisdiction properly conferred upon it by Parliament. Perhaps views have changed in the last fifty years about the proper location of the line dividing what is necessary from what is highly convenient in matters of procedure.

²⁸ *Supra*, footnote 14, at p. 206. Contrast the judgment of Martland J., at p. 200, where the "startling consequence" of the majority's view confirmed his dissenting interpretation of s. 101.

Parliament can confer upon the Federal Court so narrowly that it makes even those parts that are clearly valid so practically defective that drastic legislative reform becomes necessary,²⁹ seems a remarkable arrogation of power. No one would contend that the decision in *Fuller* produced a convenient result. The question is whether the court should have interpreted the constitution in such a way as to avoid it, or whether Parliament had created a problem which the court was right to leave to Parliament to solve.

If *The Bank of Montreal* case did not logically compel the decision in *Fuller*, the next question is whether there were other arguments, of at least equal rational cogency, which would have justified the court in disposing of the litigation in a manner that would have eased the problems of litigants who resort, whether by choice or legislative command, to the Federal Court. First, as Martland J. in his dissenting opinion pointed out, the Crown's right to recover contribution or indemnity did depend, in part at least, upon federal law. For the liability of the Crown to the plaintiff in the principal action, a matter that was disputed in that action and the third party proceedings, rested upon a question of federal law.³⁰ No support can be found in *McNamara* for the proposition that federal jurisdiction cannot extend to a claim that rests partly upon provincial law and partly upon federal law.³¹ The implications of such a view, considered later in this comment, are so far reaching that it is difficult to believe that the Supreme Court has espoused it. Whatever may be the scope of any such ancillary jurisdiction, it ought at least to exist where the right may otherwise be unenforceable altogether, or where the inconvenience and burden of requiring the parties to resort to separate proceedings to litigate the legal questions that "derive from a common nucleus of operative fact" are such that a party "would ordinarily be expected to try them all in one judicial proceeding".³² It may be noted that in the United States third-party

²⁹ This appears to have been the meaning of the following statement by Pigeon J. (*ibid.*, at p. 206): "If it is considered desirable to be able to take advantage of provincial legislation on contributory negligence which is not meant to be exercised outside the courts of the province, the proper solution is to make it possible to have those rights enforced in the manner contemplated by the general rule of the constitution of Canada, that is before the superior courts of the province."

In order to ensure that this will happen, Parliament may have to remove from the Federal Court much of its exclusive jurisdiction over civil litigation.

³⁰ See *supra*, footnote 26.

³¹ In *McNamara* itself, the court (*supra*, footnote 2, at p. 663) did not regard the statutory requirement in the Public Works Act, R.S.C., 1970, P-38, s.16(1), which required the Minister to take security for the performance of a contract, as providing an adequate foundation in federal law of the Crown's claim against the surety. See further footnote 55, *infra*.

³² *United Mineworkers v. Gibbs* (1966), 383 U.S. 715, at p. 725. Cf. Wright and Miller, *Federal Practice and Procedure*, (1969-), § 1444, where the learned

claims have been held to fall within the diversity head of federal jurisdiction in suits in which the plaintiff and defendant were diverse but where there was no diversity between the third party and the plaintiff or defendant in the main action.³³

A second approach would be to enquire whether the reference to the liability of the Crown in the Crown Liability Act³⁴ could not be interpreted to encompass any rights available to the Crown, whether by means of a counter-claim by the Crown against the plaintiff or a claim over against a third party. For both of these in a real sense relate to the liability of the Crown, in so far as they may reduce the sum ultimately payable from the public purse in respect of the "common nucleus of operative fact", from which the Crown's liability in the main action derives. The "liability" of the Crown would thus mean its *net liability* after counter-claims and claims over against third parties had been taken into account. To allow all such claims to be disposed of in a single proceeding could also plausibly be said to conduce to the *better administration* of a law of Canada, namely, the Crown Liability Act itself.^{34a} Thirdly, the court might have explored, as it has done in a number of cases which have examined the constitutionality of the maritime jurisdiction of the Federal Court, whether references in federal statutes to legal concepts that depend upon provincial law should not be regarded as referentially incorporating into federal law the appropriate provisions of provincial law. Thus when the Crown Liability Act speaks of the liability of the Crown in tort, since there is no independent body of substantive federal common law, liability is determined by the law of the relevant province. The substantive law designated by Parliament for deciding the case will thus satisfy the criterion of a law of Canada for the purposes of section 101, just as much as the express enactment in the federal statute of a body of substantive law would have done.

authors (at p. 221) formulate the task of the courts in such cases as follows: "The decision ultimately will depend on a weighing of the court's desire to preserve the integrity of constitutionally based jurisdictional limits against the desire to dispose of all disputes arising from one set of facts in an action."

³³ For a discussion, see the citation to Wright and Miller, *op. cit.*, *ibid.*; a convenient overview is provided by Laskin and Sharpe, *op. cit.*, footnote 14, at pp. 286-290.

³⁴ *Supra*, footnote 7, s. 3(1).

^{34a} This thought seems to have been accepted by Laskin C.J.C. in *Rhine v. The Queen and Prytula v. The Queen* (reasons for judgment released Dec. 2nd, 1980), when in upholding federal jurisdiction over claims for the repayment of money paid by the Crown under two statutory schemes, he said: "This is all a matter of the administration of a federal statute and is, therefore, within s. 101 of the British North America Act."

While different views can be held about the desirability of a dual court system, these should largely be resolved within the political process. If earlier authority did not compel the decision in *Fuller* it is difficult to see the fundamental constitutional values which justify the infliction of such serious inconveniences upon litigants. The Supreme Court, after all, remains a national court of appeal on questions of both provincial and federal law, and is the final court of appeal from both the Courts of Appeal in the provinces and from the Federal Court of Appeal. The same authority appoints the judges of the superior courts in the provinces as well, of course, as the judges of the Federal Court.

“Founded upon existing federal law”

The significance of the *Fuller* case clearly extends beyond the problems peculiar to litigation involving multiple parties.^{34b} These represent but one type of case in which the importance of defining the relationship between a party's legal rights and a federal law will arise. Since the Supreme Court of Canada decided *Quebec North Shore* and *McNamara* there has been no shortage of cases in which the scope, limitations, and ambiguities of this touchstone of federal jurisdiction have been considered. The case-law demonstrates that the requirement that the litigation be founded upon existing federal law is far from self-applying.

Although the Crown Liability Act does not provide an exhaustive statutory code to govern all aspects of the substantive law regulating the liability of the Crown, any more than the common law has developed a comprehensive set of principles defining the legal obligations of the Crown under a contract to which it is a party, the Supreme Court in *McNamara* appears to have established that civil proceedings against the federal Crown are always founded on federal law.³⁵ If the constitutional boundaries of federal jurisdiction are to be determined exclusively by reference to whether the plaintiff's claim is founded upon a federal law, should it be assumed that in such a suit the Federal Court may decide any issue raised by the Crown as a partial or total defence to the plaintiff's claim, even though the defence is derived from a provincial statute or the general common law?³⁶ Suppose, for instance, that the Crown pleads that the

^{34b} However, in *Rhine* and *Prytula*, *ibid.*, the Supreme Court does not mention its decision in *Fuller*, *supra*, footnote 14.

³⁵ See *supra*, footnote 26.

³⁶ S. 11 of the Crown Liability Act, *supra*, footnote 7, may be relevant here. It provides that the Crown may raise as a defence to any proceedings brought against it under the Act, any defence that would be available in litigation between subject and subject. This may well incorporate relevant provincial law, and thus make it “a law of Canada” for this purpose.

plaintiff's own carelessness contributed to the injury that he suffered as a result of the negligent driving of a post office truck by an employee of the Crown?³⁷ What if the Crown seeks to avoid liability for breach of contract by pleading that it relied upon some misrepresentation by the plaintiff? Or suppose that the Crown seeks to reduce the quantum of contractual damages by relying upon the plaintiff's failure to mitigate its loss, or by asserting a set-off? There may, of course, be a question about whether a provincial statute applies, as a matter of interpretation, to the federal Crown.³⁸ It is also very doubtful whether a province may impose statutory liabilities upon the federal Crown.³⁹ However, a provincial law that is otherwise within the constitutional competence of a provincial legislature, may regulate the rights of the federal Crown when it seeks to avail itself of a right emanating from provincial law.⁴⁰ It is

³⁷ Cf. *Murray v. The Queen*, [1965] 2 Ex. C.R. 663; [1967] S.C.R. 262, where the Crown's right to recover for the loss of a soldier's injuries inflicted partly as a result of the defendant's negligence, was held to be governed by provincial legislation. No question seems to have been raised in the Exchequer Court or the Supreme Court of Canada about the constitutionality of the jurisdiction of the Exchequer Court to entertain the Crown's tort claim. In the light of *McNamara and Fuller*, however, an interesting point was involved. While the Crown's cause of action was founded on the common law tort of *actio per quod servitium amisit*, the Exchequer Court Act, S.C., 1952, c. 98, s. 50, provided that for the purpose of claims by and against the Crown, a member of the armed forces shall be deemed a servant of the Crown. See Federal Court Act, *supra*, footnote 6, s. 37. See also the other cases cited at footnote 40, *infra*. *Quaere* whether this statutory extension of a common law cause of action would suffice to give a basis in federal law for constitutional purposes?

³⁸ Whether Crown immunity from the operation of a statute applies to the Crown in right of another level of government other than that which enacted the legislation is not altogether clear. However, in *The Queen in right of the Province of Alberta v. Canadian Transport Commission*, [1978] 1 S.C.R. 61, Laskin C.J.C. clearly thought it did. For a further critical discussion of this question, see P.W. Hogg, *op. cit.*, footnote 27, pp. 176-177.

³⁹ See *Gauthier v. The King* (1918), 56 S.C.R. 176, at pp. 182 (per Fitzpatrick C.J.), 193-194 (per Anglin J.), although the inconsistent decision of the Privy Council in *Dominion Building Corporation Ltd v. The King*, [1933] A.C. 533 makes this a notoriously difficult area of constitutional law. See further Dale Gibson (1969), 47 Can. Bar Rev. 40, esp. at pp. 51-52; P.W. Hogg, *op. cit.*, *ibid.*, pp. 178-179. And see the statement by Laskin C.J.C. in *The Queen in right of the Province of Alberta v. Canadian Transport Commission*, *ibid.*, that "a Provincial Legislature cannot in the valid exercise of its legislative power, embrace the Crown in right of Canada in any compulsory regulation. This does not mean that the federal Crown may not find itself subject to provincial legislation where it seeks to take the benefit thereof."

⁴⁰ *Murray's* case, *supra*, footnote 37 (provincial legislation restricting common law rights of recovery held to bind the federal Crown); *Toronto Transport Commission v. The King*, [1949] S.C.R. 510, at p. 521 (federal Crown may take the benefit of provincial contributory negligence legislation so as to reduce but not bar totally, its damages claim for negligence). The line may, however, be a fine one: see

surely impossible to imagine that even the narrowest reading of section 101 would deprive the Crown of the benefit of any applicable defences in provincial law, although it may be argued, by analogy with the reasoning in *Fuller's* case, that the Crown cannot assert in the Federal Court a counter-claim that is not based upon federal law, and which is capable of supporting an independent cause of action.^{40a}

In the case of a suit brought under the Crown Liability Act, then, it can plausibly be argued that the statutory reference to the "liability" of the Crown must be interpreted to incorporate by reference the relevant law of the province that would otherwise govern the dispute.⁴¹ When the facts which give rise to a cause of action are not all located in one province, and the laws of the provinces with which they are connected provide different solutions, then the law by which the "liability" of the Crown is determined, including any defences that may be available, should be interpreted to incorporate a reference to an appropriate choice of the rule. Since the forum of the action is the Federal Court, the question then arises about the choice of law rule applicable, particularly, of course, if the provinces involved have different conflict of laws rules.⁴² In so far as a federal statute implicitly authorizes the Federal Court to develop its own conflict of laws rules in order to dispose of a dispute, the

Murphy's case, *infra*, footnote 41, where provincial legislation had the effect of diminishing a defence available to the Crown at common law. Moreover, the effect upon the federal purse of provincial legislation which imposes a liability upon the Crown would seem little different from that which diminishes a defence or restricts a common law right. Different constitutional considerations may apply to a legal immunity or defence that is peculiar to the Crown.

Whether there are constitutional limitations upon Parliament's legislative power to define the civil rights and liabilities of the federal Crown is unclear. In *Nykorak v. Att.-Gen of Canada*, [1962] S.C.R. 331, federal legislation deeming a member of the armed forces to be a servant of the Crown was upheld, even though its consequence was to impose a liability in an *actio per quod* upon a private individual who, under provincial law, would not have been so liable. The court relied upon s. 91(7) of the British North America Act, 1867. Whether the "peace, order and good government" power, or the power in relation to public property and debt in s. 91(1A) would support the creation of a comprehensive federal code of Crown rights and liabilities in civil proceedings is far from certain.

^{40a} *Att.-Gen. of Canada v. Rapanos Brothers Ltd* (1980), 29 O.R. (2d) 92 (H.C.) (provincial superior court has jurisdiction to determine whether defendant has a set-off against the federal Crown, but not a counter-claim).

⁴¹ *Cf. The King v. Murphy*, [1948] S.C.R. 357, where the suppliant for a petition of right and a member of the armed forces were both found to have been at fault. It was held that the Ontario Negligence Act, *supra*, footnote 15, applied so as to reduce the suppliant's damages. The Crown was unable to rely upon the common law rule that the contributory negligence was a complete bar to his right of recovery. See also *The King v. Lapperiere*, [1946] S.C.R. 415.

⁴² *Cf. Sivaco Wire and Nail Company v. Tropwood A.G.*, [1979] 2 S.C.R. 157, at p. 166, where Laskin C.J.C. stated that the body of Canadian maritime law

constitutional requirement of a law of Canada would thus appear to be satisfied.

In litigation in which the federal Crown is not the defendant, it may be extremely difficult to determine whether a plaintiff is founding a claim upon an existing federal law. There are, nonetheless, clear cases at both extremes of the spectrum. For example, a claim for damages in which the cause of action is breach of a duty imposed upon the defendant by a federal statute, is clearly constitutionally capable of being the subject of federal jurisdiction.⁴³ The decision in *Fuller* may well add a new dimension to the familiar, if difficult, problem of determining whether breach of a particular statutory duty gives rise to a cause of action in a person injured thereby, or whether the plaintiff must establish a cause of action based, for instance, on a nominate tort (typically negligence), of which breach of the statutory duty may be an ingredient.⁴⁴ For unless the plaintiff's claim is founded directly and exclusively upon the breach of the federal statute there may be significant jurisdictional difficulties.⁴⁵

It would seem equally clear that a plaintiff cannot expand federal jurisdiction beyond its constitutional limits by basing a claim

referentially incorporated by the Federal Court Act, s. 2, "embraces conflict rules and entitles the Federal Court to find that some foreign law should be applied to the claim". He concluded, without elaboration, that the conflicts rules to be applied to select the appropriate law to determine the dispute, were those of the forum. See also *Santa Marina Shipping Co. S.A. v. Lunham and Moore Ltd.*, [1979] 1 F.C. 25 (T.D.); *United Nations v. Atlantic Seaways Corporation*, [1979] 2 F.C. 541 (C.A.).

⁴³ See, for example, *The Queen v. Rhine*, [1979] 2 F.C. 651 (C.A.) aff'd by S.C.C., *supra*, footnote 34a (Crown's claim for repayment of advance paid pursuant to Prairie Grain Advance Payments Act, R.S.C., 1970, c. P-18, as am., arose from the statute that contained a comprehensive code regulating the terms of the advance and the obligations of the payee). And see *The Queen v. Sovereign Seat Cover Mfg. Ltd* (1980), 109 D.L.R. (3d) 494 (Fed. Ct C.A.). Cf. *Canadian Pacific Ltd v. United Transportation Union*, [1979] 1 F.C. 609 (C.A.) (constitutional requirements for federal jurisdiction satisfied in action for a declaration of the plaintiff's rights under a collective agreement made binding upon the parties by the Canada Labour Code: relief refused, because the Code entrusted such questions to the Labour Relations Board).

⁴⁴ See generally, Allen M. Linden, *Canadian Tort Law* (1977), Ch. 7, pp. 285-304.

⁴⁵ See, for example, *Pacific Western Airlines Ltd v. The Queen*, *supra*, footnote 8, where it was held that since the Aeronautics Act, R.S.C., 1970, c. A-3, and the Air Regulations imposed no duties for breach of which the plaintiffs could recover damages, the legislation did not provide a basis in federal law for the plaintiff's action against the defendants other than the Crown. And see *The Queen v. Saskatchewan Wheat Pool*, [1980] 1 F.C. 407 (T.D.) rev.'d by Fed. Ct C.A. in judgment rendered on Nov. 13th, 1980; *Haida Helicopters Ltd v. Field Aviation Ltd*, [1979] 1 F.C. 143 (T.D.); *McKinlay Transport Ltd v. Goodman*, [1979] 1 F.C. 760 (C.A.). See now *Rhine and Pryula*, *supra*, footnote 34a.

for a single loss upon two independent causes of action, unless each is founded upon existing federal law.⁴⁶ Unsatisfactory as it undoubtedly is to require a litigant to separate the bases of his legal rights, whether by causes of action or by parties, and pursue them in different proceedings, this is precisely what will have to be done if the Federal Court is chosen as a forum. It is of some comfort to know that the circumstances in which a plaintiff will be forced to proceed with a claim for damages in the Federal Court by virtue of its exclusive original jurisdiction are few.⁴⁷ The most important instance is when a plaintiff wishes to sue the federal Crown.⁴⁸ The result of the decisions of the Supreme Court of Canada so far considered in this comment would appear to require the possible institution of four suits in order to resolve all the issues of legal liability that may arise when the Crown is one of several defendants: (1) the plaintiff must sue the Crown in the Federal Court; (2) proceedings against other defendants must be instituted in a court in the appropriate province or abroad; (3) if held liable, the federal Crown can only sue for contribution in a provincial court; (4) other defendants can only claim contribution against the Crown in the Federal Court. A legal system capable of inflicting outrages such as these upon the parties to litigation over commonplace occurrences is manifestly functioning at an unacceptably low level. It would surely take some very special pleading indeed to convince an unfortunate

⁴⁶ *Intermunicipal Realty and Development Corporation v. Gore Mutual Insurance Co.*, [1978] 2 F.C. 691 (T.D.) (claim arising under contract of marine insurance struck out to the extent that it was based upon negligent misrepresentation by an alleged agent of the defendant). See also *John A. MacDonald and Railquip Enterprises Ltd v. Vapor Canada Ltd*, [1977] 2 S.C.R. 134 (respondent's claim for injunctive relief inadmissible in the Federal Court to the extent that it depended upon violation of invalid federal enactment).

⁴⁷ See, Federal Court Act, *supra*, footnote 6, ss. 17(1), (3) (specified suits to which the Crown is party), s. 20 (industrial property). The Federal Court also has exclusive original jurisdiction to issue the prerogative orders of *certiorari*, prohibition, *mandamus*, and *quo warranto*, and to grant declarations and injunctions against federal boards, commissions or other tribunals, including suits in respect of such matters instituted against the Attorney General of Canada (s. 18). The Federal Court has a limited, but exclusive, jurisdiction to issue *habeas corpus* (s. 17(5)). The jurisdiction of the Federal Court of Appeal in certain public law matters is also exclusive (ss 28, 30).

The grant of exclusive jurisdiction to the Federal Court to issue *certiorari*, generally leaving in the superior courts in the provinces jurisdiction to issue *habeas corpus* in respect of federal agencies, has caused difficulties. See, for example, *Mitchell v. The Queen*, [1976] 2 S.C.R. 570, at p. 595. The Law Reform Commission of Canada has recommended that the statute should be amended to make clear that *certiorari* in aid of *habeas corpus* remains available in provincial superior courts: Report No. 14: Judicial Review and the Federal Court (1980), pp. 13-16 (Recommendation 2.5).

⁴⁸ *Ibid.*, s. 17(1).

client that such bizarre consequences are dictated by fundamental constitutional considerations.

The reasoning in *Fuller* would also seem to exclude from the jurisdiction of the Federal Court, cases in which a single cause of action depends upon questions of both federal and provincial law. The Crown's claim in *Fuller* itself was of this type. For while the right to contribution was created by provincial law, one of the issues upon which success depended was the liability of the Crown to the plaintiff, a question of federal law. Whether a plaintiff's right is founded upon existing federal law may often be difficult to determine. For instance, in one case⁴⁹ the Crown sued a student to recover a loan that had not been repaid. The loan had been made by a bank and guaranteed by the Crown. Federal legislation regulated many aspects of the transaction, including a statutory right in the Crown to be subrogated to the bank's rights against a defaulting borrower.⁵⁰ The Federal Court upheld federal jurisdiction over this action, although its reasoning appears dubious.⁵¹ In another case,⁵²

⁴⁹ *The Queen v. Prytula*, [1979] 2 F.C. 516 (C.A.); aff'd S.C.C., *supra*, footnote 34a.

⁵⁰ Canada Student Loans Act, R.S.C., 1970, c. S-17, and Canada Student Loan Regulations, SOR/68-345.

⁵¹ In the Trial Division ([1978] 1 F.C. 198), the Crown's application for a default judgment was dismissed on the ground that the statement of claim rested upon provincial law, notwithstanding that the Crown's rights were, to a large extent, the subject of a federal statute. The Court of Appeal did not find it necessary to decide whether the Crown's legal rights were so closely derived from the statute as to satisfy the *McNamara* test of federal jurisdiction.

The Court of Appeal avoided the difficulty of analysing precisely the parts played by federal and provincial law in the Crown's cause of action. Instead, the court reasoned that the law governing the contract of loan between a bank and its customer is excluded from provincial competence by the British North America Act, s. 91(15), and that no post-confederation provincial law of general application could alter law continued in force by s. 129, the repeal, amendment or alteration of which was within the exclusive legislative power of Parliament. Thus, all the law applicable to contracts between a bank and its customers is federal law, whether or not it had been made the subject of federal legislation.

There are two difficulties with this analysis. First, it seems to assume that because banking is an exclusive federal matter, the general provincial law of contract (governing such questions as capacity and the rights of guarantors), cannot apply to the kind of transaction considered in *Prytula*. The court further supported its position by alluding to the possibility that provincial law might otherwise sterilize a federally regulated activity. This was surely erroneous, and was not supported by the S.C.C. when it affirmed the decision (see *supra*, footnote 49). See P.W. Hogg, *op. cit.*, footnote 27, pp. 81-83. Secondly, in so far as the court appears to equate the term "laws of Canada" with the scope of federal legislative competence, it is plainly inconsistent with *Quebec North Shore* and *McNamara*. Indeed, the reasoning in these cases would appear inevitably to support the first criticism.

A more limited version of this thesis was propounded in *Associated Metals and Minerals Corporation v. "The Ship Evie W"*, [1978] 2 F.C. 710 (C.A.), in which

Footnote 52, see next page.

the Federal Court assumed jurisdiction over a claim for the loss of goods that was made by the owner against an air carrier. The carrier's liability was derived from a contract of carriage, the terms of which were regulated by federal statute.⁵³ Moreover, the court also held that it had jurisdiction to enter judgment in favour of the owner's insurers, to whom the owner's claim has been assigned by way of subrogation.⁵⁴

To what extent do the decisions in *McNamara* and *Fuller* suggest that the Federal Court lacks jurisdiction over cases involving elements of federal law and of provincial law which have not been referentially incorporated into federal law by federal legislation? A broad reading of *Fuller* would appear to indicate that a plaintiff's rights only constitutionally fall within federal jurisdiction if they are *exclusively* founded upon a law of Canada. It was, after all, quite clear that in that case the Crown's claim depended equally upon a federal law (its liability to the plaintiff) and upon provincial law (its contractual right to indemnity, or its right under the Ontario Negligence Act to contribution). Similarly, it might be argued that in

Jackett C.J. stated, correctly, it is submitted, that the Federal Court has no jurisdiction when Parliament could enact, but has not done so, special laws in relation to a class of persons or subject matter; in the absence of such enactments the rights and obligations of those whose activities fall within an exclusive head of federal legislative competence are governed by general provincial law. He concluded, however, that maritime law was different in that it was never part of the general law of the provinces, and even if it had not been referentially incorporated into federal law by the Admiralty Act of 1934, it remained, by virtue of s. 129 of the British North America Act, non-statutory federal law. If this conclusion is correct, it is difficult to see on what basis the marine insurance legislation enacted by several provinces could be upheld, or how the general law of a province could apply to a contract to build a ship in the province. Moreover, if Jackett C.J. were correct it is difficult to understand why the Supreme Court of Canada in the *Tropwood* case, *supra*, footnote 42, approached so cautiously the constitutional scope of the Federal Court's jurisdiction in matters of maritime law. The Supreme Court has recently affirmed the Federal Court of Appeal's judgment, but on the ground that the jurisdictional test formulated in *Tropwood* was satisfied: (1980), 31 N.R. 584.

⁵² *Bensol Customs Brokers Ltd v. Air Canada*, [1979] 2 F.C. 575 (C.A.).

⁵³ Carriage by Air Act, R.S.C., 1970, c. C-14.

⁵⁴ Cf. *The Queen v. Montreal Urban Community Transit Commission* (an unreported judgment of the Federal Court of Appeal rendered on March 19th, 1980: No. A-494-79), in which the Crown sued in the Federal Court upon its federal statutory right to be subrogated to the rights of a Crown employee whom, pursuant to federal statute, it had compensated for injuries caused by the respondent. Reversing the Trial Division, the court held that although provincial law governed the liability of the respondent for the injury sustained by the employee, "the federal statute has an important part to play in determining the rights of the parties, since without it appellant would not be able to maintain any right against respondent."

This argument sounds very like the dissent in *Fuller*; but how stands the matter after *Rhine* and *Prytula*?

McNamara the rights of the Crown depended both upon its contractual capacity (which, even though not in dispute in that case was fundamental, and, it might be thought, a question of federal law),⁵⁵ and the general provincial law of contract. If it were indeed the case that the Federal Court has no jurisdiction whenever the resolution of a dispute incidentally requires resort to provincial law

⁵⁵ Although the common law never developed a comprehensive body of principles relating to Crown contracts, fragments of a "public law" of contract do exist. Thus, the Crown's contractual capacity is subject to a vague and unsatisfactory inability to fetter by contract the future discharge of the essential functions of the Executive: *Rederiaktiebolaget Amphitrite v. R.*, [1921] 3 K.B. 500. This principle would seem of general application in one form or another, to all public bodies: see de Smith's *Judicial Review of Administrative Action* (4th ed., 1980), pp. 317-320. And for the effect upon the validity or unenforceability of a contract made by the Crown without the requisite Parliamentary allocation of funds, see de Smith, *Constitutional and Administrative Law* (3rd ed., 1977), p. 599.

It should also be noted that the Public Works Act, R.S.C., 1970, c. 228, P-38 also makes certain provisions in respect of Crown contracts. For instance, s. 16(1) requires the Minister of Public Works to take reasonable care to ensure that sufficient security is given to the Crown for due performance by the contractor. In *McNamara*, *supra*, footnote 2, Laskin C.J.C. held, at p. 663, that this did not give a sufficient basis in federal law to confer jurisdiction upon the Federal Court to entertain a claim by the Crown to enforce the bond.

S. 17 of the same Act prohibits the payment of money by the Crown until the contract has been signed by the parties and the requisite security has been given. Would the Federal Court have jurisdiction to determine a claim by the Crown for the recovery of money paid in contravention of these provisions? Should the answer depend upon whether the Crown's theory rested upon a right to recover implicit in the statute itself, or upon an action for money paid that arose from an *ultra vires* payment by the Crown?

Consider also s. 36 of the Public Works Act which requires, subject to certain exceptions, that contracts be preceded by a public tender. If this restricts the capacity of the Crown to contract, does it give a federal law basis to the Crown's rights under those contracts to which the section applies?

But see now *Rhine* and *Prytula*, *supra*, footnote 43, where the Supreme Court held that federal statutes which regulated the parties' contractual rights and duties in much more detail did provide a sufficient "shelter" of federal law so as to give the entire relationship a basis in existing and applicable federal law.

An interesting comparison is provided by *Osborn v. Bank of the United States* (1824), 22 U.S. (9 Wheat.) 738, a key case on the interpretation of the phrase in Article III of the Constitution of the United States that extends the federal judicial power to "cases arising under . . . the laws of the United States". On one view of the Supreme Court's decision, federal jurisdiction over contracts to which the bank was partly depended upon its incorporation under federal law, rather than upon the possibility that a challenge might be made to its federal authority. For a concise and penetrating analysis of the principal authorities on the "federal question" doctrine, see David P. Currie, *Federal Jurisdiction* (1976), Ch. 3. This reasoning, however, would seem of little applicability to Canada, where the reasons for conferring a separate court exercising federal jurisdiction have little to do with the protection of federally created rights, but much more with a concern that federal law should be uniformly and efficiently applied and interpreted.

which had not been incorporated into federal law, the cases left within the jurisdiction of the Federal Court over civil litigation would be few. For instance, in an action brought against the federal Crown for its vicarious liability for the torts of its servants, it will be necessary to establish an actionable tort by the servant,⁵⁶ a matter which will generally be governed by provincial law.⁵⁷ Moreover, even in a case like *Rhine*,⁵⁸ in which the court found the statutory scheme for the payment and recovery of the advances to be comprehensive, it might well be open to a payee to defend the Crown's claim for repayment by resort to common law contractual doctrines such as those relating to mistake, misrepresentation or capacity.

What test, then, is available for determining the constitutional limits of federal jurisdiction in cases in which elements of both federal and provincial law support the plaintiff's claim? One way in which the scope of the Supreme Court's decision in *McNamara* could be limited was suggested by Le Dain J. in *Bensol Customs Brokers Ltd v. Air Canada*.⁵⁹

It should be sufficient in my opinion if *the rights and obligations of the parties are to be determined to some material extent by federal law*. It should not be necessary that the cause of action be one that is created by federal law so long as it is affected by it.

One objection to this formulation is that it lacks that degree of sharpness and clarity which jurisdictional rules should possess. Whether legal rights are *to a material extent* derived from federal law, is likely to require judicial elucidation in an unacceptably large number of cases. A second difficulty, of course, is whether this test has survived the decision of the Supreme Court of Canada in the *Fuller* case where, however, no reference was made to *Bensol Customs*. It would certainly seem that the test proposed by Le Dain J. is much closer to the dissenting judgment of Martland J. than to the majority opinion.^{59a}

⁵⁶ Crown Liability Act, *supra*, footnote 7, s. 4(2).

⁵⁷ Thus, s. 17(4)(b) of the Federal Court Act, *supra*, footnote 6, which confers concurrent original jurisdiction upon the Federal Court over proceedings in which relief is claimed against a servant or agent of the Crown, has been held to be unconstitutional insofar as it permits claims for damages in tort which are not supported by federal law: see, for example *Tomossy v. Hammond*, [1979] 2 F.C. 232; *Pacific Western Airlines Ltd v. The Queen*, *supra*, footnote 8. *Quaere* whether it is nonetheless arguable that the references in the Crown Liability Act, *supra*, footnote 7, s. 3(1)(a) to the liability of the Crown for the torts of Crown servants amount to a referential incorporation into federal law of the applicable provincial law?

⁵⁸ *Supra*, footnote 43.

⁵⁹ *Supra*, footnote 52, at p. 583 (C.A.). Italics added.

^{59a} See now, however, *Rhine* and *Prytula*, *supra*, footnotes 34a and 43, where the judgment of Laskin C.J.C. may indicate that the Supreme Court is willing to move towards a position similar to that adopted by Le Dain J.

The facts of *Bensol Customs* provide a useful context in which to examine the precise scope of the decision in *Fuller*. The plaintiffs were the owner of goods and their insurers who claimed as subrogees of the owner's rights against the carrier for the loss of the goods. The owner's statement of claim alleged that the carrier was liable by virtue of the Carriage by Air Act,⁶⁰ and in tort. The insurers, who were the only active plaintiffs, claimed that they were assignees by subrogation of whatever rights the owner had against the carrier. The litigation was instituted in the Federal Court pursuant to section 23 of the Federal Court Act which gives the court concurrent jurisdiction in respect of claims made "under an Act of the Parliament of Canada or otherwise in relation to any matter coming within . . . aeronautics and works and undertakings . . . extending beyond the limits of a province."⁶¹ Pratte J. (with whom Hyde D.J. concurred) confined his judgment to the interpretation of section 23, and held that the owner's claim in contract was made "under" the Carriage by Air Act,⁶² but that its claim in tort was not founded upon a federal law and should, therefore, be dismissed.⁶³ As regards the insurer's claim, he held that this, too, fell within section 23 since it was made, in part at least, under a federal statute. Le Dain J. agreed with the reasons for decision given by Pratte J., and proceeded to consider, in the terms quoted above, the constitutionality of the assumption of jurisdiction in the light of *McNamara*.

Following the decision in *Fuller*, however, the correctness of Le Dain J.'s approach looks highly suspect.^{63a} In particular, the fact that an essential element in the insurer's claim was the federal law question of the carrier's liability to the owner would appear an

⁶⁰ *Supra*, footnote 53. This Act gives effect to the Warsaw Convention; the most material provisions for the purposes of this litigation seemed to be that the carrier is liable for loss unless it proves that it was not at fault, and that conditions relieving the carrier of its liability under the Convention are void.

⁶¹ The goods were allegedly lost while being carried between London and Montreal.

⁶² The fact that the owner's cause of action was for breach of contract, rather than for breach of statutory duty, was not regarded by Pratte J. as fatal to federal jurisdiction. Since no statement of defence had been put in by the defendants, it is difficult to tell to what extent the issues in dispute were likely to turn upon the statutory provisions. Nor does the Convention comprehensively determine each and every condition that may be contained in an air waybill (see [1979] 1 F.C. 167, at pp. 177-178).

⁶³ Dismissal of this part of the statement of claim did not prejudice the court's jurisdiction to determine that part which was within the jurisdiction. Assuming that the liability in tort survives the Warsaw Convention, the owners of the goods would have to pursue any additional rights that they might have in tort in a provincial court. This is yet another instance of the inconveniences of the dual court system now operating in Canada.

^{63a} But see *supra*, footnote 59a.

inadequate basis upon which to rest federal jurisdiction. If the Crown's right to contribution in *Fuller* was not founded on federal law (albeit that the Crown's liability to the plaintiff was a matter of federal law, and was a condition precedent to the right asserted), it is difficult to see why the insurer's claim was founded on federal law (albeit that whether there were any rights upon which the subrogation could operate depended upon federal law). As for the rights of the owner of the goods, since these derived from contract (albeit that federal law regulated the terms of the contract), it is not at all clear that they would now be held to be based upon federal law.

It is difficult to avoid the conclusion that the Supreme Court of Canada in *Fuller* has held that for a claim to be "founded on federal law", the plaintiff's cause of action must be for breach of a federal statutory duty. The only exception so far admitted is that the liability of the federal Crown always rests upon federal law. Thus, the reason why the Crown lost in *Fuller* was because its *cause of action* arose under provincial law. If this is the test, it at least has the merit of some certainty.⁶⁴ It is, however, quite a long way removed from the apparently wider wording of section 101 which speaks, it will be recalled, of "the better administration of the laws of Canada". It is also an interpretation that evidently did not occur to the Supreme Court when it had earlier decided a number of cases in which the federal Crown had sued in the Exchequer Court for the loss of the services of a member of the armed forces who had been injured by the negligence of the defendant.⁶⁵ Now it would have to be said that the Crown's cause of action was the ordinary law of tort, and the fact that the injured person is deemed by federal legislation to be a

⁶⁴ This was the approach recently taken by the Federal Court of Appeal in *The Queen v. Sovereign Seat Cover Mfg Ltd*, *supra*, footnote 43, in which the court dismissed a motion by the defendants to strike out as beyond the jurisdiction of the Federal Court an action by the Crown to recover a development incentive grant. In the Trial Division the motion had been granted because "the payment of the incentive had been made under the terms of a contract between the parties, a contract constituted by the acceptance by the defendants of a written offer made to them by the plaintiff." The Federal Court of Appeal, however, interpreted the terms of the relevant legislation under which the payment was made, as not merely defining the parties' contractual rights, but as constituting the very legal rights, upon the breach of which the Crown based its cause of action.

The judgments of the Supreme Court in *Rhine* and *Prytula*, *supra*, footnotes 43 and 49 are equivocal on the question of whether the Crown must show that breach of a federal statute gives rise to a statutory cause of action or that a federal statute closely regulates the parties' contractual rights and duties.

⁶⁵ See, for example, *The King v. Richardson*, [1948] S.C.R. 57; *Murray v. The Queen*, *supra*, footnote 37. Nor was any constitutional objection made to the common law causes of action brought by the Crown in the Exchequer Court in *Toronto Transport Commission v. The King*, *supra*, footnote 39, and *Gartland Steamship Co. v. The Queen*, [1960] S.C.R. 315.

servant of the Crown would be as inadequate a basis for federal jurisdiction as was the liability of the Crown to the plaintiff in *Fuller*.

One other possible way of defining the relationship between a plaintiff's rights and federal law that is necessary to found federal jurisdiction was suggested in *The Queen v. Prytula*.⁶⁶ In that case, the Crown sued a student borrower for the repayment of a loan upon which the respondent had defaulted. The relevant federal legislation provided that when a bank made a "guaranteed student loan" (as statutorily defined), the Crown was liable to pay to the bank interest on the loan and to compensate the lending bank for any loss that it suffered on default.⁶⁷ The Act also empowered the Governor in Council to make regulations concerning "the subrogation of Her Majesty to the rights of a bank with respect to a guaranteed student loan".⁶⁸ For reasons already explained,⁶⁹ the Federal Court of Appeal finessed the issue of whether the Crown's claim was "founded" on the statute within the meaning of the decision in *McNamara*. Nonetheless, Heald J. formulated as follows the question that would have been relevant if the court had had to decide it:⁷⁰

... unless the law impliedly creates a *new statutory liability* by the borrower to Her Majesty in an amount to be determined by reference to the loan contract, as opposed to merely conferring on the Crown the rights of the bank under the contract of loan, it is open to question whether the statute can be said to be the law that is being administered by a court when it is adjudicating on the claim by Her Majesty against the borrower from the Bank.

If the interpretation of the statute revealed that the first basis of the Crown's rights was correct, would this make the claim one that was "founded on existing federal law" as this criterion must be understood in the light of *Fuller*? If by a "new" statutory liability, what is meant is that had the statute not been enacted, the respondent could not have been sued by the Crown, it would seem that this would be insufficient. For in *Fuller* the Crown had been sued by the plaintiff in tort, and had the Crown Liability Act not been in force, it could not have been held liable. Nonetheless, the "new" liability created by that Act was an inadequate basis in federal law upon which to bring its claim for contribution within federal jurisdiction.

⁶⁶ *Supra*, footnote 49.

⁶⁷ Canada Students Loans Act, *supra*, footnote 50.

⁶⁸ *Ibid.*, s. 13(j). This provision gives a firmer base in federal law for the Crown's rights than the insurer's rights in *Bensol Customs*, *supra*, footnote 52.

⁶⁹ See *supra*, footnote 51.

⁷⁰ *Supra*, footnote 49, at pp. 523-524.

The analysis suggested earlier would indicate that the proper question is whether the Crown's cause of action arises directly from a breach of statutory duty, rather than from the common law, albeit that the extent of the Crown's rights may be affected by relevant federal legislation.⁷¹ Does the Student Loans Act so clearly and comprehensively define the rights and obligations of the parties that it can fairly be said to create a statutory cause of action? The scheme certainly does more than to authorize the Crown to give guarantees for loans made in specified circumstances. Nonetheless, the Crown's cause of action against the defaulting borrower would seem to be the common money count for the repayment of money paid to the borrower. The relevance of the legislation would then be to show either that the guarantee was not given voluntarily by the Crown, or that the forms prescribed by it and signed by the borrower constituted a "request" for the guarantee. This would defeat any argument that the Crown's payment to the bank constituted the "officious" conferral of a benefit upon the borrower such as will often defeat a restitutionary action.⁷²

There is always an air of unreality about interpreting legislation to divine the legislature's "intention" on a matter about which it had clearly never thought. To require courts to perform this exercise in an area of notorious difficulty in order to apply a *constitutional* standard of jurisdiction seems little short of bizarre. Indeed, if the Supreme Court in *Fuller* has defined the permissible scope of federal jurisdiction by reference to the nature of the plaintiff's cause of action, it may have given an unwelcome lease of life to some of the lost arts of common law pleading. However, in the reasons for judgment in *Rhine* and *Prytula*—released as this comment was being submitted to the *Review*—the Supreme Court appears to have started to dig itself out of the hole created by *Fuller*. For despite the statement by Laskin C.J.C. that the federal statutes in those cases provided for the repayment of the money which the Crown was suing to recover, other remarks suggest that federal jurisdiction may extend beyond causes of action founded on a federal law. In particular, he emphasized the "overall scheme" created by the legislation, and noted that despite the "undertaking or contractual consequence" of the application of the statutes, "at every turn the *Act* has its impact on the undertaking so as to make it proper to say that there is here existing and valid federal law to govern the

⁷¹ Nor should it be critical whether the statute increased beyond that recoverable at common law the quantum of any amount that the Crown could claim from the defaulting borrower. And see *supra*, footnote 64.

⁷² See *Owen v. Tate*, [1976] Q.B. 706. See further, Goff and Jones, *The Law of Restitution* (2nd ed., 1978), Ch. 14.

transaction". Since *Fuller* was not mentioned by the court, one can only speculate as to why in that case the Crown Liability Act had insufficient impact to support federal jurisdiction over the contribution claim.

When is law "federal law"?

If the decision in *Fuller* requires so close a relationship between legal rights and a federal law as has been suggested, then a more fruitful method of avoiding the inconvenient results described above may be to focus upon the question of whether any relevant federal legislation can be interpreted as incorporating into federal law the substantive provincial law by which the parties' legal relationship would otherwise be governed.

Of course, it will not always be easy to predict when the courts will interpret a federal statute to include a referential incorporation of provincial law. On the one hand, it seems clear that when the federal Crown is sued in tort, in the absence of some specific federal statute, the liability is determined by the provincial law that would have applied had the litigation been between subject and subject. The reference in the Crown Liability Act to the Crown's liability in tort is taken to refer to the applicable provincial law, and not to some substantive federal law of tort. On the other hand, it has been equally clear since *McNamara*, that references in the Federal Court Act to suits brought by the Crown do not incorporate wholesale into federal law, the relevant provincial law. Nor do they authorize the Federal Court to develop a substantive body of judge-made federal common law upon which federal jurisdiction could operate.

The incorporation by reference doctrine appears to have been developed most effectively on the admiralty side of the Federal Court's jurisdiction. In particular, in *Sivaco Wire and Nail Company v. Tropwood A.G.*,⁷³ the Supreme Court held that the Federal Court Act referentially incorporates certain aspects of maritime and admiralty law. Thus, the definition in section 2 of that Act of "Canadian maritime law" was said to include the section of the Admiralty Act of 1891⁷⁴ which, even though it was repealed before the Federal Court Act was enacted,⁷⁵ provided that "all persons shall have such rights and remedies in all matters" relating to admiralty that were enforceable by virtue of the British Colonial Courts of Admiralty Act, 1890. Jurisdiction to determine disputes arising from this substantive body of law was conferred upon the Exchequer Court.

⁷³ *Supra*, footnote 42.

⁷⁴ S.C., 1891, c. 29, s. 4.

⁷⁵ Admiralty Act, S.C., 1934, c. 31.

After the Chief Justice in the *Tropwood*⁷⁶ case had expressly left open the question of whether an item of the Federal Court's admiralty jurisdiction which had not been covered by the 1891 Act was for jurisdictional purposes "a law of Canada", it is surprising to read how easily the Supreme Court disposed of the issue in *Antares Shipping Corporation v. The Ship "Capricorn"*.⁷⁷ The court held that the Federal Court had jurisdiction to entertain an action for the specific performance of a contract of sale of a ship, on the ground that the provision of the Federal Court Act dealing with claims to title, possession or ownership of a ship was an existing federal law upon which the court's jurisdiction could operate.⁷⁸ The single judgment, delivered by Ritchie J., is not, however, as explicit as it might have been about the basis of this conclusion. His Lordship appears to have regarded the grants of jurisdiction conferred upon the Federal Court by section 22 and 44 of the Federal Court Act as sufficient in themselves.⁷⁹ It is true that the following statement in *Tropwood*⁸⁰ might appear to support Ritchie J's view:

"What is important to notice is that the heads of jurisdiction specified in s. 22(2) are nourished, so far as applicable law is concerned, by the ambit of Canadian maritime law or any other existing law of Canada relating to any matter coming within the class of navigation and shipping".

However, it is clear from the rest of the judgment that the court did not decide that each element of the definition of "Canadian maritime law" in section 2 incorporated a substantive body of law on which

⁷⁶ *Sivaco Wire and Nail Co. v. Tropwood A.G.*, *supra*, footnote 42, at pp. 162-163, where Laskin, C.J.C. inclined to the view that the Admiralty Act, 1934, *ibid.*, could provide a statutory foundation for maritime law.

⁷⁷ (1980), 30 N.R. 104. Although reasons for judgment in *Antares* and *Fuller* were given within eight days of each other, the cases pass, as it were, like ships in the night.

⁷⁸ In the Federal Court of Appeal, [1978] 2 F.C. 834, Le Dain J., relying upon a line of decisions in the United States, had held that actions for the specific performance of a contract of such type did not fall within s. 22 of the Federal Court Act, *supra*, footnote 6.

⁷⁹ *Cf.* the judgment of the Trial Division in *Antares*, [1973] F.C. 955; *Associated Metals and Mineral Corporation v. The Ship "Evie W"*, *supra*, footnote 51; *Benson Bros. Shipbuilding Co. (1960) Ltd v. Mark Fishing Co Ltd* (1978), 89 D.L.R. (3d) 527 (Fed. Ct C.A.); *Davie Shipbuilding Ltd v. The Queen*, *supra*, footnote 19; *The Queen v. Canadian Vickers Ltd* (1979), 28 N.R. 486 (Fed. Ct C.A.). See also *In the matter of a Reference as to the Legislative Competence of Parliament of Canada to Enact Bill No. 9, Entitled "An Act to Amend the Supreme Court Act"*, [1940] S.C.R. 49, at pp. 108-109, where Kerwin J. regarded the power of Parliament to confer admiralty jurisdiction upon the Exchequer Court as being co-extensive with its legislative competence under s. 91(10). In the light of *Quebec North Shore and McNamara*, the Supreme Court's difficulty now is to explain why admiralty law is "federal law" whereas other non-statutory law relating to federal subject-matter generally is not.

⁸⁰ *Supra*, footnote 42, at p. 161.

the jurisdiction conferred by section 22 operated. The holding was confined to a finding that section 2 included a reference to the Canadian Admiralty Act, 1891 and that this Act incorporates certain substantive admiralty law into the law of Canada. In *Antares*, the Supreme Court did not specifically consider whether the plaintiff's claim was governed by a law that fell within the jurisdiction of the English Court of Admiralty and which could have been referentially incorporated by the Admiralty Act, 1891, or, if it did not, whether the Admiralty Act, 1934 incorporated it.

The true basis of the court's judgment in *Antares* is thus obscure, although a broad reading of the decision might indicate that the references to admiralty jurisdiction and maritime matters in the Federal Court Act are to be regarded as incorporating English admiralty law, as amended by Canadian statutes, into federal law.⁸¹ Thus, the only limits upon the Federal Court's jurisdiction are those contained in the relevant grant of legislative competence by the British North America Act, 1867, section 91(10), over shipping and navigation, and by the statutory definitions of jurisdiction contained in the Federal Court Act itself.

That this is indeed the position appears to have been confirmed by the recent decision of the Supreme Court in *Associated Metals and Minerals Corp. v. The Ship "Evie W"*⁸² in which the court relied upon the broad statement quoted above from the judgment of Laskin C.J.C. in *Tropwood*. *Antares* and *Associated Metals* provide a sharp contrast with the narrow approach adopted by the Supreme Court to other heads of the Federal Court's jurisdiction. No less remarkable is the terseness with which the Supreme Court has dealt with the fundamental question of the extent to which the provisions of the Federal Court Act, other than the narrow question already decided in *Tropwood*, are to be interpreted as referentially embodying substantive law in addition to conferring jurisdiction.

Possible reforms

The first ten years of the Federal Court's existence have produced a remarkably large number of jurisdictional difficulties. This comment has concentrated on the most important of those created by the limited constitutional power of Parliament to confer jurisdiction upon a federal court. The recent report of the Law Reform Commission⁸³ details the jurisdictional difficulties that have

⁸¹ Until its repeal as part of Canadian law in 1934, the Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict., c. 27 (U.K.), s. 3, provided an alternative source of Parliament's power to confer admiralty jurisdiction upon a court.

⁸² (1980), 31 N.R. 584.

⁸³ Report No. 14, *op. cit.*, footnote 47, pp. 11-20.

arisen from the interpretation of the statutory terms which define the jurisdiction of the Federal Court over federal public authorities, a jurisdiction formerly exercised by the courts in the provinces. The application and the interpretation of sections 18 and 28 of the Federal Court Act which allocate jurisdiction between the Trial Division of the Court of Appeal have also attracted litigation on a scale that could scarcely have been anticipated when the statute was passed.

Amidst this avalanche of jurisdictional litigation, the suggestion that a dual court system for Canada is misconceived has obvious attractions. It is to be hoped that the Government will undertake a comprehensive assessment of the troubles that have beset the Federal Court, and attempt a dispassionate evaluation of the record overall, rather than respond in piecemeal fashion to particular difficulties. However, the combined effect of *Quebec North Shore, McNamara* and *Fuller* may well have caused such serious problems for parties to litigation in which the federal Government is one of several defendants, that an immediate amendment to the Act to make the whole of the Federal Court's section 17 jurisdiction concurrent would seem justifiable. The terms of section 17 would seem clearly to preclude reform by the administrative device of the federal Crown's attorning to the jurisdiction of a provincial superior court.

If, on the other hand, Parliament's considered view is that there is merit in maintaining the wide original jurisdiction of the Federal Court, amending legislation will be needed in order to give a base in federal law to the rights upon which it can constitutionally adjudicate. A Federal Court (Amendment) Bill might be drafted to achieve these aims by the wholesale incorporation into federal law of provincial laws in so far as their subject matter falls within federal legislative competence.⁸⁴

Clause 1

- (1) Whenever the legal rights and liabilities of parties to litigation over which the Federal Court has been granted jurisdiction by virtue of any provision of the Federal Court Act or of any other statute enacted by the Parliament of Canada are not founded upon an existing federal statute or other federal law, it is hereby provided that the said rights and liabilities shall be determined in accordance with:
 - (a) the provisions of any applicable provincial statute to the extent that its subject-matter falls within the legislative competence of the Parliament of Canada, and
 - (b) in the absence of any such applicable provincial statute, and to the extent that it is within the legislative competence of the Parliament of Canada to modify or repeal it, the common law.

⁸⁴ That this is a constitutionally permissible technique is amply supported by the authorities assembled by Laskin and Sharpe, *op. cit.*, footnote 14, in notes 98 and 118. For a contrary view, though, see Kerr, *Constitutional Limitations on the Admiralty Jurisdiction of the Federal Court* (1979), 5 Dal. L.J. 568, at p. 577.

- (2) To the extent that it is necessary for the determination of the legal rights and liabilities of parties to litigation over which the Federal Court has jurisdiction to resort to the law of more than one Province or to the law of a foreign country, the said rights and liabilities shall be determined in accordance with the laws of that legal system which the common law relating to the conflict of laws makes applicable.

Clause 2

Any law which, pursuant to Clause 1, is applicable to a dispute over which the Federal Court has been granted jurisdiction is hereby incorporated into federal law and adopted as a law of Canada.

Clause 3

For the purpose of this Act,

- (1) "Statute" includes any law made under the authority of a statute.
(2) "Common Law" in clause 1(1)(b) includes the common law rules relating to the conflict of laws.

Conclusions

This comment has examined the role played by the Supreme Court in producing a state of affairs which has been judicially described as lamentable.⁸⁵ If the learned judge had chosen the word scandalous, he could surely not have been criticized for resorting to melodramatic hyperbole. Why then, has the court decided to interpret section 101 in a way that results in such obvious inconvenience and injustice to litigants? Certainly neither previous authority nor the specific language in the constitution was logically compelling. The answer must be that the court has attached a high priority to the strategic goal of maintaining the integrity of the unitary court system which it saw embodied in the overall scheme for the allocation of the judicial power in the British North America Act, 1867. It has chosen to pursue this value at the expense of the tactical objective of interpreting the constitution in a way which would smooth the administration of justice in the interests of those who choose or are forced to litigate in the Federal Court. It thus construed in a very narrow fashion the one exception to the unitary court system which the constitution very clearly contains.

Precisely why the court has not reacted in similar vein to the maritime jurisdiction conferred by Parliament upon the Federal Court is not easy to say. A list of reasons to account for this attitude might include the long historical association of the Exchequer Court with admiralty law, the strong reasons of expediency for ensuring the uniform development and application of the law, and its enforcement in a single court with powers to deal with its special procedural and remedial aspects, the international dimensions of the law relating to

⁸⁵ By Collier J. in *Pacific Western Airlines Ltd v. The Queen*, *supra*, footnote 3.

ships and shipping, and the comparatively slight provincial interest in this area of the administration of justice.

In so far as the Supreme Court has decided to prefer the constitutional value of a unitary court system to the more immediate consideration of doing justice to particular litigants, it has not necessarily exceeded its proper role. But there is another constitutional interest which the court ought also to take carefully into account. This is that the legislative judgments of Parliament on matters of policy are entitled to judicial respect. Thus if Parliament has purported to exercise its constitutional authority on a subject assigned to it by the British North America Act, then the court should interpret the scope of the grant of power in a way which enables Parliament's policy to be effective. The most telling criticism of the decision in *Fuller* is that even though required neither by the text of the constitution nor by previous authority, the court has interpreted Parliament's powers so narrowly that it has rendered admittedly unimpeachable provisions of the Federal Court Act seriously defective.

The court has in effect forced the hand of Parliament to attempt to salvage what it will from the wreckage. It is to be hoped that the task of producing new legislation is regarded as important enough to warrant an expeditious and thorough response, and that the often painful experiences of the first ten years of the Federal Court will ultimately be turned to good account.

J. M. EVANS*

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*J. M. Evans, of Osgoode Hall Law School, York University, Toronto.

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¹ *R. v. Hauser et al.* (1979), 46 C.C.C. (2d) 481 (S.C.C.).